THE CURIOUS, PERJURIOUS REQUIREMENTS OF ILLINOIS SUPREME COURT RULE 12(B)(3)

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I. INTRODUCTION AND PURPOSE

A 2010 survey of Illinois Civil Procedure discussed recent amendments to the Illinois Supreme Court Rules that apply to civil practice issues.[1] The survey began with Notices of Appeal and a substantial part of the survey of Notices of Appeal was devoted to *Secura Insurance Co. v. Illinois Farmers Insurance Co*.[2] The purpose of this Article is to examine in greater depth the requirements of filing notices of appeal under Illinois Supreme Court Rule 12(b)(3) and the corresponding proof of service of Rule 373.

Illinois Supreme Court Rule 12(b)(3) has what can only be called "curious, perjurious requirements." They are curious because, in conjunction with Rule 373, they require an affiant to state under penalty of perjury that he or she has personal knowledge of events that have not yet occurred. They are perjurious because they require the affiants to state under oath or penalty of perjury that they already performed an act when in fact they did not and could not have performed at the time the affidavit was executed. The rule in essence states "unless you swear you performed an act that you did not actually perform your case will not be heard by the court."

Illinois Supreme Court Rule 12(b)(3) states,

> (b) Manner of Proof. Service is proved:
> (3) in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail or delivered the document to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid . . . .[3]

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1. Timothy J. Chorvat & Christine P. Benavente, *Survey of Illinois Law: Civil Procedure*, 34 S. ILL. U. L.J. 807 (2010).
2. *Id.* at 814–17; Secura Ins. Co. v. Ill. Farmers Ins. Co., 902 N.E.2d 662 (Ill. 2009).
3. ILL. SUP. CT. R. 12(b).

Rule 12(b)(3) must be read in conjunction with Illinois Supreme Court Rule 373, which states

> Unless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing, or the time of delivery to a third-party commercial carrier for delivery to the clerk within three business days, shall be deemed the time of filing. Proof of mailing or delivery to a third-party commercial carrier shall be as provided in Rule 12(b)(3). This rule also applies to a motion directed against the judgment and to the notice of appeal filed in the trial court.[4]

Rule 373 was revised to its present form to allow proof of service by affidavit as a result of problems with either illegible or missing postmarks.[5] Rule 373 was enacted in 1967. The Rule's purpose is to "make it unnecessary for counsel to make sure that briefs and other papers mailed before the filing date actually reach the reviewing court within the time limit."[6] If the clerk's office receives the paper "a day or two" after the filing date, a court will not prohibit an appeal.[7] The original rule "provided that the time of mailing might be evidenced by the postmark affixed by a United States Post Office."[8] "Because of problems with the legibility of postmarks, and delay in affixing them in some cases, the rule was amended in 1981 to provide for the use of affidavits of mailing or United States Postal Service certificates of mailing"[9] In 1985, the rule was amended to allow for filing date recordings in an attempt to simplify record keeping in the appellate and supreme courts.[10]

In order to show the curious, perjurious requirements of Rule 12(b)(3), several factors must first be considered separately: the Rule itself, the nature of affidavits, and the meaning of perjury. When combined, it is clear that, although an affidavit is a "simple" piece of paper, the Rule, as discussed *infra*, is tantamount to requiring an affiant to commit perjury.

Part II of this Article will review recent Rule 12(b)(3) cases in the courts and is discussed in conjunction with Rule 373. Part III will discuss the legal requirements of affidavits followed by a discussion of the nature of perjury and rules of statutory construction. Part IV considers the abuse and misuse

4. ILL. SUP. CT. R. 373.
5. ILL. SUP. CT. R. 373, COMMITTEE COMMENTS.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id*.

of Rule 12(b)(3). Last, Part V presents conclusions and recommendations to resolve the contradictions and inconsistencies associated with Rule 12(b)(3).

II. HISTORY OF ILLINOIS RULE 12(B)(3) IN THE COURTS FROM 2009 TO 2014

A. Rule 12(b)(3) in the Illinois Supreme Court

A comprehensive Westlaw search on September 30, 2014, turned up more than sixty reported cases, of which half of the Appellate Court opinions were marked "UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING. NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1)."[11]

In 2009, the Illinois Supreme Court issued what most district appellate courts considered a strict interpretation of Rule 12(b)(3).[12] A detailed analysis of that case is therefore necessary. In *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, the plaintiff filed a declaratory judgment action against Illinois Farmers Insurance Company and both parties filed motions for summary judgment.[13]

"The trial court granted Farmers' motion for summary judgment and denied Secura's motion for summary judgment."[14] Secura then moved for reconsideration of the trial court's order, which was denied on May 17, 2006.[15] Secura filed a notice of appeal but failed to include an affidavit of service stating the date and time of mailing.[16] The appellate court denied Farmers' motion to dismiss for failure to timely file the notice of appeal because the court did not receive Secura's notice of appeal until June 20, 2006.[17] Farmers filed a motion to dismiss the appeal for lack of jurisdiction

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11. ILL. SUP. CT. R. 23(e)(1). The Rule provides,

> (e) Effect of Orders. (1) An order entered under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court. (2) An order entered under subpart (b) of this rule must contain on its first page a notice in substantially the following form: NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Id.

12. *See* Chorvat & Benavente, *supra* note 1, at 817.
13. 902 N.E.2d 662, 663 (Ill. 2009).
14. *Id.* at 664.
15. *Id.*
16. *Id.*
17. *Id.*

because no affidavit of service was filed, and the appellate court initially granted this appeal.[18]

After the appeal was dismissed Secura moved for leave to respond and to rehear Farmers' motion to dismiss, which the court granted.[19] On rehearing, the appellate court vacated its order dismissing the appeal and allowed Secura to supplement the record with a letter that had been sent to the circuit court dated June 16, 2006.[20] The appellate court denied Farmers' motion to dismiss the appeal and ruled that the court was not deprived of jurisdiction, that the failure to comply by filing an affidavit of service was a "harmless error," and there was no showing of prejudice to Farmers.[21]

Farmers appealed to the Illinois Supreme Court, which held that the timely filing of a notice of appeal is both "jurisdictional and mandatory"[22] and according to Rule 303(a)(1),[23] Secura's notice of appeal was due within thirty days—June 16th—following the order granting summary judgment.[24] Since there was no dispute that the appellate court did not receive the notice of appeal within thirty days, Rule 373 required the court to consider Rule 12(b)(3). The court stated that

> while Rule 373 relaxes the requirement of timely filing where a party takes advantage of the convenience of mailing a document, a party can only take advantage of Rule 373 if it files proper proof of mailing as required by Rule 12(b)(3). The reason for such a requirement is elementary. If there is no proof of mailing on file, there is nothing in the record to establish the date the document was timely mailed to confer jurisdiction on the appellate court.[25]

Farmers argued that the cover letter submitted by Secura to supplement the record was not adequate proof of service, while Secura argued that the cover letter was sufficient to comply with Rule 12(b)(3).[26] However, the Supreme Court held that the cover letter

> does not provide 'proof of mailing' such that it is *competent evidence* under the rule. The letter does not contain an affidavit or a certificate and nothing is certified or sworn to. The cover letter contains only a date, which, at best, indicates that it may have been mailed on that date. This is simply

18. *Id*.
19. *Id*.
20. *Id*.
21. *Id.*
22. ILL. SUP. CT. R. 303(a)(1).
23. *Secura Ins. Co.*, 902 N.E.2d at 666.
24. *Id*. at 665.
25. *Id*. at 666 (citations omitted).
26. *Id*. at 665–66.

> insufficient for purposes of the rule. Indeed, the record, having been supplemented with the cover letter, offers no more certainty concerning the timeliness of the notice than it did before the cover letter became part of the record.[27]

The Illinois Supreme Court ruled that the appellate court lacked jurisdiction and stated that the appeal should have been dismissed.[28] The court vacated the judgment of the appellate court and dismissed the appeal for lack of jurisdiction.[29]

In its ruling the Supreme Court stated, "[T]his court has general supervisory authority to oversee the administration of its own rules in the statewide system of courts."[30] This statement takes on greater significance in cases where rules of statutory construction are applied to interpreting Supreme Court rules.[31]

In considering the requirement of filing an affidavit of service, what the Illinois Supreme Court in *Secura* did not say is as important as what it did say. The court said that "there is nothing in the record to establish the date the document was timely mailed to confer jurisdiction on the appellate court."[32] The court did *not* say whether there could be other, competent evidence in the record other than an affidavit of service that could establish the date a notice of appeal was timely mailed in order to confer jurisdiction on the appellate court.

The following section reviews relevant cases from each appellate district on a district-by-district basis.

B. Rule 12(b)(3) in the Appellate Courts

There is a split among the districts on how to interpret Rule 12(b)(3). However, due to the large number of cases, only a few representative cases can be reviewed here. Many of the 12(b)(3) cases arose from incarcerated persons fling pro se appeals.

1. First District

In *People v. Makiel* the defendant filed a pro se notice of appeal from orders dismissing his petition for relief from the judgment and a motion for

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27. *Id.* at 666 (emphasis added).
28. *Id.* at 667.
29. *Id.*
30. *Id.*
31. *See infra* Part III.B.
32. *Secura Ins. Co.*, 902 N.E.2d at 666.

re-sentencing.[33] The trial court entered its orders on October 16, 2009.[34] The defendant filed his notice of appeal on November 23, 2009, the date it was stamped, which was eight days after the due date.[35] The defendant argued that the notice of appeal was timely mailed and supplemented the record with a photocopy of the envelope that was postmarked November 5, 2009.[36] The front of the envelope was dated November 23, 2009, but the back of the envelope was stamped November 9, 2009.[37]

The First District ruled that Makiel did not timely mail his notice of appeal because he did not file an affidavit of service.[38] The court cited *Secura* and *People v. Tlatenchi* in which the appellants relied on the "date of mailing" rule to establish the date of mailing, which was rejected by the court.[39]

The court also relied on *People v. Lugo* in which the majority held that proof of mailing must be by certificate or affidavit of mailing, and since a postmark is neither, it is insufficient proof of mailing.[40] However, a dissent in the *Lugo* ruling disagreed with the reasoning of the majority that since a postmark is neither a certificate nor affidavit, it is not competent evidence of proof of mailing.[41]

Importantly, the First District discussed at length a Second District case, *People v. Hansen*, that adopted the minority dissent in *Lugo* and held that the postmark on an envelope containing the notice of appeal was sufficient to establish the date the appeal was mailed for purposes of the date of mailing rule where the postmark was legible.[42] However, the First District noted that the *Hansen* ruling departed from the *Lugo* majority and found that *Hansen* provided no basis for departing from *Tlatenchi*.[43]

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33. 2012 IL App (1st) 093430-U, ¶ 2, *appeal denied, and vacated*, 978 N.E.2d 241 (Ill. 2012).
34. *Id.*
35. *Id.* ¶ 6.
36. *Id.* ¶ 12.
37. *Id.*
38. *Id.* ¶ 17.
39. *Id.*; *see also* People v. Tlatenchi, 909 N.E.2d 198 (Ill. App. Ct. 2009).
40. *Id.*; *see also* People v. Lugo, 910 N.E.2d 767 (Ill. App. Ct. 2009).
41. *Lugo*, 910 N.E.2d at 774 (McLaren, J., dissenting). The dissent in *Lugo* is discussed in greater detail in *infra* Part III.B.
42. *Makiel*, 2012 IL App (1st) 093430-U, ¶ 18; *see also* People v. Hansen, 952 N.E.2d 82, 86–87 (Ill. App. Ct. 2011).
43. *Makiel*, 2012 IL App (1st) 093430-U, ¶ 18.

2. Second District

In *People v. Lugo* the defendant was indicted on three counts of solicitation of murder for hire.[44] The "defendant pleaded guilty to count I, and the trial court granted the State's motion."[45] The trial court denied the defendant's motion to withdraw his guilty plea and sentenced him to twenty years in prison.[46] The trial court dismissed the defendant's post-conviction petition, and the defendant appealed.[47]

The defendant's notice of appeal was stamped March 15, 2007, but an envelope which was taped to the back of the notice of appeal was postmarked March 2, 2007.[48] The envelope was not file-stamped and no affidavit of service of the notice of appeal was included in the record on appeal.[49]

The notice of appeal was due March 4, 2007, (March 5 because March 4 was a Sunday) but was stamped March 15, 2007, ten days late.[50] The court noted that if the postmark of March 2, 2007, was sufficient proof of timely mailing then the defendant's notice of appeal was filed within thirty days.[51] To determine whether the postmark serves as proof of mailing under Rule 373 the court considered what it believed to be the intent of the drafters of the rule. The court reasoned that

> [U]nder the plain language of Rule 373, proof of mailing *must* be as provided in Rule 12(b)(3). Rule 12(b)(3) provides that proof is by certificate or affidavit of mailing. It does not provide for proof in any other form. Thus, the language of Rule 373 is in providing that proof of mailing must be by certificate or affidavit of mailing. Accordingly, if proof of mailing must be by certificate or affidavit of mailing, then it cannot be by postmark, as a postmark is neither a certificate nor an affidavit of mailing.[52]

The court inferred that the Supreme Court of Illinois removed from Rule 373 language that specifically allowed postmarks to serve as proof of mailing.[53] The court noted that the 1967 version of Rule 373 provided,

> The time of mailing, which may be evidenced by a post mark affixed in and by a United States Post Office, shall be deemed the time of filing the record

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44. 910 N.E.2d 767, 768 (Ill. App. Ct. 2009).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 769.
51. *Id.*
52. *Id.*
53. *Id.* at 770.

> on appeal, any brief, excerpts from record, or any other paper required to be filed in a reviewing court within a specified time.[54]

The court further reasoned that a 1981 amendment to Rule 373 no longer provided for proof of mailing by a postmark[55] but instead required a "certificate of the attorney, or affidavit from the person who deposited the paper in the mail stating the date and place of mailing and the fact that proper postage was prepaid, or a United States Postal Service certificate of mailing."[56] The court cited the Committee Comments that explained the change:

> As originally adopted the rule provided that the time of mailing might be evidenced by the post mark affixed by a United States Post Office. Because of problems with the legibility of post marks, and delay in affixing them in some cases, the rule was amended in 1981 to provide for the use of affidavits of mailing [or] United States Postal Service certificates of mailing.[57]

The court concluded that the supreme court chose to eliminate postmarks as proofs of service by requiring that proof of mailing be in the form of a certificate or affidavit of mailing, as provided in Rule 12(b)(3).[58] The court believed, contrary to the dissent, that the amendments to Rule 373 indicated an intent on the part of the rule's drafters to narrow the permissible forms of proof of mailing by changing the word from "may be evidenced by a post mark affixed in and by a United States Post Office" to "shall be" in the form of a certificate or affidavit of mailing.[59]

Importantly the court noted that, as pointed out by the dissent, there was no issue of postmarks in *Secura*, and, thus, *Secura* was a different factual situation.[60] Nevertheless, the court did not agree that the absence of postmarks in *Secura* did not support the court's decision because "the requirements of Rule 373 do not turn on whether the case involves a cover letter or a postmark, we do not believe that the fact *Secura* involved a cover letter while the present case involves a postmark diminishes the relevance of *Secura* to our decision."[61]

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54. *Id.*
55. *Id.* at 771.
56. *Id.* (citing ILL. SUP. CT. R. 373).
57. *Id.* at 770 (quoting ILL. SUP. CT. R. 373, COMMITTEE COMMENTS (1985)).
58. *Id.*
59. *Id.* at 771.
60. *Id.* at 772.
61. *Id.*

The court determined that the language of Rule 373 was

> unambiguous in requiring, by reference to Rule 12(b)(3), proof of mailing of a notice of appeal by certificate or affidavit of mailing. A postmark is not a certificate or affidavit of mailing and has been specifically rejected by the drafters of Rule 373 as an acceptable form of proof of mailing . . . we do not believe that the reliability of postmarks has any bearing on the question of what constitutes sufficient proof of mailing under Rule 373. *Our decision is not based on a determination of what form of proof of mailing is most reliable*, but instead is based on the language of Rule 373. Where the supreme court has chosen to require a certificate or affidavit of mailing instead of the dissent's arguably more reliable postmark, we are not in a position to disregard that decision.[62]

Justice McLaren dissented, believing that the majority read Rule 12(b)(3) too literally and narrowly.[63] The dissent stated that, "The paramount rule of our interpretation is to glean the intent of Rule 12(b)(3) and then follow it."[64] The dissent observed that the comments are silent as to whether it was the drafters' intent to abandon the postmark as competent proof of mailing.[65]

The dissent applied a syllogistic argument: "[B]efore a postmark can be stamped on an envelope, the envelope [containing the affidavit] must [then] be placed in the mail. If the postmark is timely, then it is immaterial when the envelope was actually placed in the mail."[66] Thus, the dissent recognized that the affidavit of service must be executed prior to placing it in the mail, but did not realize the importance of the sequence, namely, it is impossible to know with certainty ahead of time when the notice of appeal would actually be placed in the mail.

The dissent went on to state,

> It defies the purpose of the mailbox rule to conclude that a certificate or affidavit must be the only means to establish a timely mailing. For the majority to conclude that the rule will not entertain such a syllogistic proof is to determine that equivocal silence is an explicit negation of the pro-mailing policy of Rule 12(b)(3) and the mailbox rule. If, as determined by the majority, everything that is not specifically allowed is proscribed because it is "specifically rejected," then several prior cases interpreting Rule 12(b)(3) are incorrect and the affidavit must be executed by staff, and

62. *Id.* (emphasis added).
63. *Id.* at 774 (McLaren, J., dissenting).
64. *Id.*
65. *Id.* at 775.
66. *Id.* at 777.

> an attempted subsequent filing of the proof of mailing is incompetent despite what *Secura* states.[67]

The dissent reviewed the history of Rule 12(b)(3) and stated,

> A fair reading of the history of the rules and their amendments indicates a consistent broadening of the application of the mailbox rule in order to give the mailer the greatest benefit. The fact that the rule has eased the procedure for establishing compliance with the mailbox rule does not mean that there has been an affirmative statement that otherwise competent proof of mailing is no longer competent.[68]

Notably, while Judge McLaren wrote the dissent in the *Lugo* case that rejected a postmark as proof of mailing, he wrote the majority opinion in *People v. Hansen* in which he adopted his dissent in *Lugo* just two years earlier.[69] Following a jury trial, the defendant was convicted of first-degree murder and sentenced to sixty years' imprisonment.[70] The supreme court affirmed the defendant's conviction and sentence, and the defendant sought pro se post-conviction relief.[71]

On September 23, 2008, the trial court dismissed the petition.[72] The defendant then moved the trial court to reconsider its ruling but on November 5, 2008, the court denied the motion to reconsider.[73] The court's written order was dated November 5, 2008, but not stamped until November 10, 2008, and was not delivered to the defendant until November 19, 2008.[74] The defendant then filed a notice of appeal.[75] The affidavit of service stated that the notice of appeal was placed in the prison's mail system on December 8, 2008.[76] The State argued that the court was without jurisdiction over the appeal because the defendant's notice of appeal was not timely filed.[77]

In considering whether *Secura* applied, the court noted that the only evidence of the date of mailing submitted in *Secura* was the date contained in the body of a cover letter.[78] However, there was something in the record on appeal that established the date of mailing of *Hansen*'s appeal— "a clear postmark of 'Dec 10 2008' on the envelope in which the notice of appeal was

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67. *Id.*
68. *Id.* at 778.
69. 952 N.E.2d 82 (Ill. App. Ct. 2011).
70. *Id.* at 84.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 86.

mailed."[79] The court reviewed the majority decision in *Lugo* made just two years earlier but rejected it in favor of the dissent.[80]

> We conclude, as did the dissent in *Lugo*, that *Lugo* is too literal and narrow in its reading and interpretation of Rules 373 and 12(b)(3) . . . It is axiomatic that, if there is a timely and legible postmark, an affidavit or a certification of mailing is a corroborative redundancy. Requiring a court to overlook a clearly legible postmark showing that a document was processed by a disinterested third party, such as the post office, on or before the date by which the document was required to be mailed is to disregard the best, *most competent* evidence of the latest date of mailing consistent with the "pro-mailing policy of Rule 373."[81]

The majority then concluded that a clearly legible postmark is sufficient proof of mailing under Rule 373, and therefore, the defendant's notice of appeal was timely filed.[82] However, in a reversal of roles, the dissent in *Hansen* sided with the majority in *Lugo* revealing not only a sharp division between the districts, but also how a final judgment depends on the whim of the courts.[83]

3. Fourth District

In *People v. Davis* the defendant pleaded guilty in August 2010, to two counts of unlawful delivery of a controlled substance.[84] On October 5, 2010, the trial court sentenced her to two concurrent five-year prison terms.[85] Since the defendant was sentenced on October 5, 2010, she had until November 4, 2010, to file a motion to withdraw her plea or file a motion to reconsider the sentence, but her pro se letter was file-stamped by the clerk of the court on November 22, 2010, which was beyond the thirty-day deadline.[86]

The court cited *People v. Tlatenchi* where it was held that an incarcerated defendant's appeal is "considered timely filed if it is placed in the prison mail system within the 30-day period, regardless of the date on which the motion is received or file-stamped."[87] Although the proof of service was dated November 3, 2010, it was notarized on November 10, 2010, after the thirty–day period.[88] Therefore, the proof of service did not

79. *Id.*
80. *Id.*
81. *Id.* at 86–87 (citations omitted) (emphasis added).
82. *Id.* at 87.
83. *See id.* at 89 (Jorgensen, J., dissenting).
84. 2011 IL App (4th) 110274-U, ¶ 3.
85. *Id.*
86. *Id.* ¶ 11.
87. *Id.* ¶ 12 (citing People v. Tlatenchi, 909 N.E.2d 198, 204 (Ill. App. Ct. 2009)).
88. *Id.* ¶ 16.

constitute an "affidavit" under Rule 12(b)(3) until it was "sworn to by a party before some person who has authority under the law to administer oaths" on November 10, 2010.[89]

Nevertheless, the deficiencies in the defendant's motion were excused since she was not properly admonished by the trial court regarding the filing requirements of a notice of appeal pursuant to Rule 605(b).[90]

In *People v. Smith*, in February 2009, the State charged the defendant with aggravated driving under the influence of alcohol.[91] After a June 2009 bench trial the court found the defendant guilty.[92] At a July 2009 hearing the court sentenced defendant to twenty years' imprisonment.[93] The defendant filed a pro se motion to reduce his sentence.[94] On August 11, 2009, the defendant filed a notice of appeal, which was stamped on September 2, 2009.[95] The defendant also filed an "affidavit of service" that stated, *inter alia*, that he had mailed the motion on August 28, 2009.[96] On September 10, 2009, the court granted the defendant leave to file a late notice of appeal, which was filed in the trial court on September 11, 2009.[97] On October 23, 2009, the defendant's defense counsel filed a motion for a new trial or alternatively to reduce the sentence.[98] The State argued that the trial court lacked jurisdiction because it was untimely filed and should therefore be dismissed.[99]

In deciding whether the motion was timely filed, the court considered both *Tlatenchi*, where a defendant relied upon the date of mailing as the date of filing for a post-plea motion, proof of mailing must be as provided by Illinois Supreme Court Rule 12(b)(3), and *Hansen*, where a clear, legible postmark was sufficient to prove date of mailing.[100] The court adopted the *Tlatenchi* requirement that proof of mailing must strictly comply with Rule 12(b)(3) by including an affidavit of service.[101]

In *People v. Blalock* the defendant pleaded guilty to one count of unlawful use of a weapon by a convicted felon "in exchange for the State's

89. *Id.*
90. *Id.* ¶ 19.
91. 2011 IL App (4th) 100430, ¶ 1, 960 N.E.2d 595, 596, *appeal denied, and vacated*, 8 N.E.3d 1042 (Ill. 2014).
92. *Id.*, 960 N.E.2d at 597.
93. *Id.*, 960 N.E.2d at 597.
94. *Id.*, 960 N.E.2d at 597.
95. *Id.* ¶ 7, 960 N.E.2d at 597.
96. *Id.*, 906 N.E.2d at 597.
97. *Id.*, 906 N.E.2d at 597.
98. *Id.* ¶ 8, N.E.2d at 598.
99. *Id.* ¶ 11, N.E.2d at 598.
100. *Id.* ¶¶ 14–17, 960 N.E.2d at 599–600.
101. *Id.* ¶ 17, 960 N.E.2d at 600. The Supreme Court of Illinois subsequently vacated the judgment without comment. People v. Smith, 8 N.E.2d 1042 (Ill. 2014) (order vacating judgment of appellate court).

dismissal of the second count and a recommendation of a four-year sentence."[102] "In November, 2008, the trial court sentenced the defendant to 30 months' probation."[103]

The State filed several petitions to revoke the defendant's probation.[104] In May 2010, the trial court conducted a hearing on the State's first petition to revoke the defendant's probation and found the defendant in violation of his probation, and the court subsequently resentenced the defendant to four years in prison.[105] "On August 10, 2010, the defendant filed a pro se motion for a reduction of his sentence."[106] After a hearing in December 2010, the trial court denied the motion to reconsider and the defendant appealed.[107]

The circuit court stamped the defendant's motion on Tuesday, August 10, 2010, after the deadline to file the motion.[108] The envelope in which the defendant mailed his motion, along with a sworn statement that the attached motion was true and correct, a notice of filing, and an affidavit of service, all on one sheet of paper, which showed a postmark of August 6, 2010.[109] The only notarization on the one sheet of paper was located at the top of the paper and was dated August 5, 2010.[110]

The State argued first, that the defendant cited no cases that held that a notarization of a sworn statement may also be considered as evidence that the affidavit of service was notarized when both are on a single piece of paper and more than one set of staple holes are visible on the forms calling into question whether the documents were originally mailed together is mere speculation.[111] The State also argued that the affidavit was insufficient because it failed to state "the complete address which appeared on the envelope or package" as required by Rule 12(b)(3).[112]

The court held that because the defendant failed to comply with Rule 12(b)(3)'s affidavit requirement the date on which the court clerk stamped it is the date it was filed and therefore the motion was untimely.[113] It reasoned that supreme court rules "have the force of law, and the presumption must be that they will be obeyed and enforced as written."[114]

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102. *Smith*, 2011 IL App (4th) 100430, ¶ 17, 976 N.E.2d at 645.
103. *Id.*, 976 N.E.2d at 645.
104. *Id.* ¶ 2, N.E.2d at 645.
105. *Id.*, N.E.2d at 645.
106. *Id.* ¶ 3, N.E.2d at 645.
107. *Id.*, N.E.2d at 645.
108. *Id.* ¶ 7, N.E.2d at 646.
109. *Id.*, N.E.2d at 646.
110. *Id.*, N.E.2d at 646.
111. *Id.* ¶ 10, N.E.2d at 647.
112. *Id.*, N.E.2d at 647.
113. *Id.* ¶ 11, N.E.2d at 647.
114. *Id.*, N.E.2d at 647 (citations omitted).

5. Fifth District

In *People v. Kayich*, the defendant appealed the dismissal of his motion, filed on January 20, 2011, to withdraw his guilty plea, to vacate his sentence, and to reduce his sentence.[115] The State moved to dismiss the defendant's pro se motions on the grounds they were not timely filed.[116] The defendant argued that his motions were timely filed because he placed them in the prison mailing system on January 10, 2011.[117] The circuit court granted the State's motion to dismiss the defendant's motions.[118]

The court was unable to locate any envelope in the record and therefore did not address the issue of "whether a pro se incarcerated defendant may escape the affidavit requirement of Rule 12(b)(3) by a postmarked envelope."[119] The date of filing was January 20, 2011, which was the date it was stamped by the court clerk, and the notice of appeal was therefore not timely filed.[120]

III. THE CURIOUS, PERJURIOUS REQUIREMENTS OF ILLINOIS RULE 12(B)(3)

A. Affidavits, Perjury, and Statutory Construction

Rule 12(b)(3) requires the filing of an affidavit of service[121] "stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid."[122] What constitutes an affidavit has been considered by several courts and therefore it is necessary to consider affidavits in conjunction with the required affidavit of service.

1. Affidavits

Supreme Court Rule 191 sets forth the requirements for an affidavit. An affidavit

115. 2013 IL App (5th) 110245-U, ¶ 4.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* ¶ 10.
120. *Id.*
121. An affidavit is required for non-attorneys. ILL. SUP. CT. R. 12(b)(2). A certificate of service is required to be filed by an attorney. *Id.* For purposes of this analysis, they are considered equivalent.
122. ILL. SUP. CT. R. 12(b)(3). Curiously, the Rule does not state that the address must be the correct address, or even the address on file. It need only contain the address to where the notice was mailed.

> (1) shall be made on the personal knowledge of the affiants;
> (2) shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based;
> (3) shall have attached thereto sworn or certified copies of all documents upon which the affiant relies;
> (4) shall not consist of conclusions but of facts admissible in evidence; and
> (5) shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.[123]

As ruled by the Illinois Supreme Court in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, "Statements in an affidavit which are based on information and belief or which are unsupported conclusions, opinions, or *speculation* are insufficient."[124] Yet, that is exactly what an affidavit of service of a notice of appeal contains—speculation regarding a future event.

Furthermore, the Fourth District has held that affidavits containing self-serving statements do not comply with Rule 191(a).[125] Certainly statements in an affidavit of service of a notice of appeal concerning the date and time of mailing cannot be considered anything less than self-serving since it determines whether an appellate court has jurisdiction under Rule 12(b)(3). While an affidavit of service contains obviously self-serving statements, rather than being rejected, as would an affidavit for any other purpose, it is required under Rule 12(b)(3).

In *People v. Saunders* the defendant was convicted of murder.[126] The defendant appealed, and the supreme court affirmed his conviction and sentence.[127] The defendant then filed a pro se petition pursuant to the Post-Conviction Hearing Act.[128] The petition was notarized and dated December 30, 1991.[129] Attached to the petition was a notarized document entitled "Proof of Service" which was also dated December 30, 1991, stating that he placed the petition in the United States Mail at the Centralia Correctional Center on December 30, 1991.[130] The court clerk stamped the petition on January 9, 1992.[131] "On January 28, 1992, the State moved to dismiss the petition on the grounds that the petition was filed more than three years after the date of defendant's conviction."[132] The circuit court concluded that the

123. ILL. SUP. CT. R. 191(a). *See also* Steve L. Dellinger, *The Art of Motions: Understanding Illinois Civil Pretrial Motions*, 38 S. ILL. U. L.J. 183, 210–13 (2014).
124. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1223 (Ill. 1992) (emphasis added) (citations omitted).
125. *See* Jones v. Dettro, 720 N.E.2d 343, 347 (Ill. App. Ct. 1999).
126. 633 N.E.2d 1340, 1340 (Ill. App. Ct. 1994).
127. *Id.* at 1340–41.
128. *Id.* at 1341.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

petition was not timely filed and granted the State's motion to dismiss and the defendant appealed.[133]

The defendant included an affidavit of service that stated the petition was mailed on December 30, 1991.[134] The appellate court allowed the defendant to file a late notice of appeal.[135] In opposing the proof of service the State argued that the court would "encourage and provide an opportunity for the falsification of certificates and affidavits."[136] Although the court minimized the risk of false affidavits, it did explicitly recognize that the risk of false affidavits is in fact present. The court stated, "Where, as here, the petitioner is incarcerated and must rely on the incarcerating institution's notary public to verify his documents, the risk of fraud is slight."[137]

In *People v. Perkins* the First District appellate court stated that, "An affiant must have first-hand knowledge of the factual allegations contained in the affidavit" and that affidavits should be made on "personal knowledge."[138] Importantly, the court explicitly recognized that the filing of a false affidavit could give rise to a prosecution for perjury or a court imposed sanction for contempt of court.[139]

In *People v. Poierier* the defendant was charged and pled guilty to one count of aggravated DUI and one count of aggravated fleeing and eluding.[140] He subsequently moved to withdraw his plea of guilty.[141] The trial court denied the motion and the defendant appealed.[142] The Third District Appellate Court did not receive the notice of appeal, but noted that the defendant did file a proof of service and notarized affidavit stating the date he placed the original motion in the prison mail, and therefore from the record the defendant took all the necessary steps to ensure that his motion was timely mailed in compliance with Rule 12(b)(3).[143]

Notably, although the court accepted the affidavit as proof of timely filing, the court cited *People v. Saunders*, where the court found that "the use of the incarcerating institution's notary public minimizes the risk of false affidavits"[144] thus again making an explicit recognition that affidavits of service have a risk that they may be false.

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133. *Id.*
134. *Id.* at 1343.
135. *Id.*
136. *Id.*
137. *Id.*
138. 636 N.E.2d 780, 783 (Ill. App. Ct. 1994).
139. *Id.* at 782.
140. 2014 IL App (3d) 120618-U, ¶ 8.
141. *Id.* ¶ 9.
142. *Id.* ¶ 19.
143. *Id* ¶ 32.
144. *Id.*; *see also* People v. Saunders, 633 N.E.2d 1340, 1342 (Ill. App. Ct. 1994).

In *Roth v. Illinois Farmers Insurance Co.*, the Illinois Supreme Court discussed at length what an affidavit is.

> Illinois courts have defined [affidavit] in consistent fashion for over 100 years. For example, in *Harris v. Lester*, 80 Ill. 307, 311 (1875), this court noted that "[a]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths. It does not depend on the fact whether it is entitled in any cause or in any particular way. Without any caption whatever, it is nevertheless an affidavit . . . More recently, our appellate court has noted that "'[a]n affidavit is simply a declaration, on oath, in writing sworn to before some person who has authority under the law to administer oaths. A writing which does not appear to have been sworn to before any officer does not constitute an affidavit. . . . .Thus, an affidavit must be sworn to, and statements in a writing not sworn to before an authorized person cannot be considered affidavits [citations omitted].'"[145]

However, an affidavit is more than "simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths."[146] Recently, the Fifth District Appellate Court, in *People v. Schoffner*, stated that where an affidavit does not set forth specific facts to support that it is based upon personal knowledge, it is insufficient.[147] Furthermore, the dissent in *Lugo* stated, "The fact that a party claims to have placed the paper in the mail does not make it so."[148] The dissent cited *Baca v. Trejo* where the affidavit of service stated it was placed in the United States Postal Service (USPS), when it was actually placed in the United Parcel Service (UPS).[149] While it was only different by one letter ("S"), it was enough to deny a timely filing since the rule for delivering the affidavit to a private delivery service such as UPS differs significantly from the rule for delivering it to the USPS.[150] Thus, whether intentional or not, the affidavit was false.[151] The question naturally arises, if an affidavit can be false about a past event, how is an affidavit not false about an event that has not yet occurred?

Therefore, for a court to accept the sufficiency of an affidavit requires a two-step process. First, an affidavit must be a declaration, on oath, in writing, and sworn to by a party before some person who has authority under

145. Roth v. Ill. Farmers Ins. Co., 782 N.E.2d 212, 214 (Ill. 2002).
146. *Id*.
147. 2014 IL App (5th) 120201-U, ¶ 18.
148. People v. Lugo, 910 N.E.2d 767, 775 n.3 (Ill. App. Ct. 2009) (McLaren, J., dissenting).
149. *Id.*; *see also* Baca v. Trejo, 902 N.E.2d 1108 (Ill. 2009).
150. *See Baca*, 902 N.E.2d at 1112.
151. *Id.* at 1113.

the law to administer oaths.[152] Second, statements in the affidavit must be made on the personal knowledge of the affiant, and not based on speculation or be self-serving.[153]

It hardly needs to be said that no one has personal knowledge of an act that he or she has not yet performed, and no one has personal knowledge of actions that take place in the future. Yet, in spite of this, an affidavit of service requires an affiant to swear to something about which he or she can have no personal knowledge (since it takes place in the future) and that he or she has not performed. It is nothing more than speculation about a future event or a statement of intent about an act to be performed in the future.

2. Perjury

An affidavit can be a basis for a perjury charge,[154] and in Illinois perjury is a Class 3 felony.[155] "A person commits perjury when, under oath or affirmation, in a proceeding or *in any other matter where by law the oath or affirmation is required*, he or she makes a false statement, *material to the issue or point in question*, *knowing the statement is false*"[156] In *People v. Perkins*, the First District explicitly recognized that the filing of a false affidavit could give rise to a prosecution for perjury or a court imposed sanction for contempt of court.[157]

An affidavit of service is required by law. The affiant knows that the statement is false at the time of executing the affidavit because he or she has not performed the act sworn to in the affidavit at the time of executing the affidavit. The time of filing a notice of appeal is clearly material to the issue or point in question since it determines the jurisdiction of an appellate court to hear an appeal. Thus, all the elements of perjury are met in the execution and filing of an affidavit of service.

3. Statutory Construction

The rules of statutory construction, as described by the appellate court in *Mason v. John Boos & Co*., are

> In determining what the intent is, the court may properly consider not only the language used in a statute but also the reason and necessity for the law, the evils sought to be remedied, and the purpose sought to be achieved. In

152. Roth v. Ill. Farmers Ins. Co., 782 N.E.2d 212, 214 (Ill. 2002).
153. Jones v. Dettro, 720 N.E.2d 343, 347 (Ill. App. Ct. 1999).
154. *See* People v. Mason, 376 N.E.2d 1059, 1062 (Ill App. Ct. 1978).
155. 720 ILL. COMP. STAT. 5/32-2(e) (2014).
156. *Id.* § 5/32-2 (emphasis added).
157. 636 N.E.2d 780, 782 (Ill. App. Ct. 1994).

> construing a statute, the court must assume that the legislature did not intend an absurd result.[158]

The Illinois Supreme Court had previously explained the rules of statutory construction in *Mulligan v. Joliet Regional Port District*,

> Where language of statute admits of two constructions, one of which would make enactment absurd and illogical, while the other renders it reasonable and sensible, construction which leads to absurd result must be avoided [citations omitted]. Proper interpretation of provision cannot simply be based on its language; it must be grounded on nature, objects and consequences that would result from construing it one way or the other.[159]

A 2002 Illinois Supreme Court case also considered statutory construction. In *Robidoux v. Oliphant* the court explained the application of statutory construction applicable to Supreme Court Rules.[160]

> It is well settled that the construction of our rules is comparable to this court's construction of statutes. The committee comments to Supreme Court Rule 2 state that 'the same principles that govern the construction of statutes are applicable to the rules'…[citation omitted] (supreme court rules are neither aspirational nor are they suggestions; '[t]hey have the force of law, and the presumption must be that they will be obeyed and enforced as written'). As is the case with statutes, our primary task in construing a rule is to ascertain and give effect to the intent of its drafters.[161]

Applying the rules of statutory construction to Supreme Court Rule 12(b)(3), and comparing the rules of statutory construction to how both the Supreme Court and appellate courts actually construct Supreme Court rules, reveals a glaring inconsistency. On the one hand, Supreme Court rules "are unambiguous"[162] and "the same principles that govern the construction of statutes are applicable to the rules."[163] On the other hand, the Supreme Court has ignored its own rulemaking procedures which demonstrates not only that Rule (12)(b)(3) is ambiguous but also rules of statutory construction cannot easily be applied to determining the judicial intent of Rule 12(b)(3). Notwithstanding assertions that Supreme Court rules are unambiguous and

158. 2011 IL App (5th), ¶ 6, 959 N.E.2d 209, 212 (citations omitted).
159. 527 N.E.2d 1264, 1269 (Ill. 1988).
160. *See* 775 N.E.2d 987 (Ill. 2002).
161. *Id.* at 992 (citations omitted).
162. People v. Lugo, 910 N.E.2d 767, 769 (Ill. App. Ct. 2009).
163. *Robidoux*, 775 N.E.2d at 992 (citing ILL. SUP. CT. R. 2, COMMITTEE COMMENTS).

have the force of law both the supreme court and appellate courts have carved out exceptions to Rule 12(b)(3).[164]

Supreme Court rules are made through formal rulemaking procedures as set forth by Illinois Supreme Court Rule 3.

> (1) These procedures are adopted to provide for the orderly and timely review of proposed rules and proposed amendments to existing rules of the Supreme Court; to provide an opportunity for comments and suggestions by the public, the bench, and the bar; to aid the Supreme Court in discharging its rulemaking responsibilities; to make a public record of all such proposals; and to provide for public access to an annual report concerning such proposals.
> (2) The Supreme Court reserves the prerogative of departing from the procedures of this rule. An order of the Supreme Court adopting any rule or amendment shall constitute an order modifying these procedures to the extent, if any, they have not been complied with in respect to that proposal.[165]

According to Rule 3(a)(2), the only way to adopt, modify, or amend a rule other than by the formal rulemaking procedure of 3(a)(1) is by an order of the Illinois Supreme Court departing from the procedures of the Rule. While the Illinois Supreme Court has stated it has "general supervisory authority to oversee the administration of its own rules in the statewide system of courts,"[166] by Rule 3(a)(2) its "supervisory authority" does not encompass making exceptions to rules outside of Rule 3 Rulemaking Procedures.

Prior to September 19, 2014, when the court revised Rule 12(b)[167] the court had issued no order making an exception to Rule 12(b)(3) with respect to affidavits of service for incarcerated persons. Yet, as previously noted, prior to the 2014 revision exceptions were made in several cases for incarcerated persons[168] outside of the rulemaking procedures, and the revision was adopted to incorporate the previous exceptions into the Rule, thus recognizing that compliance with the Rule is problematic.

If rules of statutory construction were to be strictly applied in determining the judicial intent of Rules 12(b)(3) and 373, then Rules 12(b)(3) and 373 must be informed by both Rule 191, which governs the content of affidavits and the definition of perjury. An affidavit of service under Rules

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164. *See, e.g.*, People v. Davis, 2011 IL App (4th) 110274-U; People v. Saunders, 633 N.E.2d 1340 (Ill. App. Ct. 1994); People v. Perkins, 636 N.E.2d 780 (Ill. App. Ct. 1994).
165. ILL. SUP. CT. R. 3(a)(1)-(2).
166. Secura Ins. Co. v. Ill. Farmers Ins. Co., 902 N.E.2d 662, 667 (Ill. 2009).
167. ILL. SUP. CT. R. 12(b)(4).
168. *See, e.g.*, *Davis*, 2011 IL App (4th) 110274-U; *Saunders*, 633 N.E.2d 1340; *Perkins*, 636 N.E.2d 780.

12(b)(3) and 373 could therefore not be accepted as proof of service since it does not comply with Rule 191. As the Illinois Supreme Court previously explained in *Mulligan v. Joliet Regional Port District*,

> Where language of statute admits of two constructions, one of which would make enactment absurd and illogical, while the other renders it reasonable and sensible, construction which leads to absurd result must be avoided [citations omitted]. Proper interpretation of provision cannot simply be based on its language; it must be grounded on nature, objects and consequences that would result from construing it one way or the other.[169]

IV. THE USE, MISUSE, AND ABUSE OF RULE 12(B)(3)

Rule 12(b)(3) is not as unambiguous as portrayed by the courts. The inherent contradiction of Rules 12(b)(3), 191, and 373 renders an affidavit of service devoid of any legal meaning since it is "absurd and illogical" and leads to an "absurd result." It is an open invitation for the misuse and abuse of Rule 12(b)(3).

To be accepted by a court, an affidavit must be made on the basis of personal knowledge. If an affiant does not have personal knowledge about the contents of the affidavit, the affidavit is false and cannot be accepted by a court. Therefore, an affidavit of service should not be accepted by a court since it is speculation about a future event and is not based on personal knowledge. But, not only is an affidavit of service accepted, it is required and tantamount to a court imposed requirement for an appellant to commit perjury. Such uneven and inconsistent approaches to the interpretation of judicial intent and the enforcement of Rule 12(b)(3) portray an image of rule by caprice.

This opens the door for the misuse and abuse of Rule 12(b)(3). The solution for missing or illegible postmarks may be worse than the problem, since it is equivalent to a requirement to commit perjury.

In *People v. Saunders* the court discussed the possibility of false affidavits.[170]

> The State claims that, by following Johnson we would encourage and provide an opportunity for the falsification of certificates and affidavits. Although the court minimized the risk of false affidavits, it did recognize that the risk of false affidavits is present. "Where, as here, the petitioner is

169. 527 N.E.2d 1264, 1269 (Ill. 1988).
170. *See* 633 N.E.2d 1340.

> incarcerated and must rely on the incarcerating institution's notary public to verify his documents, the risk of fraud is slight."[171]

The dissent in *Lugo* observed that

> a defendant's affidavit would suffice even though he did not actually place the paper in the mail. If the rule can be interpreted in such a way when it is silent as to allowing an affidavit from a person who did not actually place the paper in the mail, then it would seem that my interpretation concerning the inclusion of a timely legible postmark as proof of mailing is reasonable as well.[172]

While the risk of fraud by an incarcerated person may be slight it is present, and the risk of fraud by a non-incarcerated person is significantly higher. The sequence of complying with Rule 12(b)(3) requires the affiant to execute an affidavit of service stating the date the notice was mailed. Then the affiant must place the notice and the affidavit in an envelope. Then the affiant must go to the post office. Then, the affiant must apply postage to the envelope. Then, the affiant must either place the envelope in a mailbox or deliver the envelope to the postal clerk in order for the envelope to be postmarked.

Due to the logical impossibility of the sequence of complying with the Rule, manipulating and circumventing the rule is easily accomplished. It is easy, e.g., for an appellant to notarize an affidavit of service stating the notice of appeal was placed in the mail by the deadline, but then not actually place it in the mail until one, two, or three weeks after the deadline, thereby disadvantaging the opposing party. The postmark would clearly prove that contrary to the affidavit the notice was not mailed prior to the deadline. Yet, the postmark would be disregarded and the self-serving affidavit would prevail.[173]

V. CONCLUSIONS AND RECOMMENDTIONS

Although Rule 12(b) was revised recently to address the difficulties of incarcerated pro se appellants in executing an affidavit,[174] the curious,

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171. *Id.* at 1342 (citations omitted).

172. People v. Lugo, 910 N.E.2d 767, 776 (Ill. App. Ct. 2009) (McLaren, J., dissenting).

173. It is unknown how many times this may have already occurred.

174. ILL. SUP. CT. R. 12(b)(4). The Committee Comments state,

> The rules on service and filing have been revised to provide for sending documents via third-party commercial carrier. Under these rules, the term "delivery" refers to all the carrier's standard pick-up methods, such as dropping a package in a UPS or FedEx box or with a UPS or FedEx contractor.

Id., COMMITTEE COMMENTS.

perjurious requirements of the Rule remain. There are several alternatives that can remedy the contradictions and inconsistencies associated with the current affidavit of proof of service of Rule 12(b)(3). Three such alternatives are:

1. Use a "highest and best evidence" rule (similar to the best evidence rule in litigation), which would accept either a postmark if it is present, or an affidavit of service if a postmark were missing or illegible.[175]
2. Use the earlier of either an affidavit of service or a legible postmark to prove date of mailing.
3. Require the filing an affidavit of service within, e.g., forty-eight hours after service.

Unless and until Rule 12(b)(3) is revised, Illinois courts can expect to see a manipulation of the Rule by parties attempting to place the opposing party at a disadvantage.

175. *See Lugo*, 910 N.E.2d 767 (McLaren, J., dissenting); People v. Hansen, 952 N.E.2d 82, 86–87 (Ill. App. Ct. 2011).